

HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALLYSON HENRY,)
Plaintiff,) NO. CV 05-1510RSM
vs.) DEFENDANT EXPEDIA'S MOTION TO
IAC/INTERACTIVECORP and EXPEDIA,) ALLOW FILING OF COUNTERCLAIMS
Inc., corporations,) NOTE ON MOTION CALENDAR:
Defendants.) November 15, 2005

I. RELIEF REQUESTED

Defendant Expedia, Inc. ("Expedia") seeks leave to file Counterclaims pursuant to Federal Rules of Civil Procedure 13(e) and 15(a), as indicated in Defendant Expedia's Counterclaims attached. *See* Baldwin Dec., Exhibit pp. 1-6. Since filing its Answers, Defenses and Affirmative Defenses of Defendant Expedia, Inc. to Plaintiff's Amended Complaint (hereinafter "Amended Answer") on August 23, 2005, Expedia acquired knowledge of facts giving rise to compulsory counterclaims against Plaintiff Allyson Henry. Expedia now seeks the Court's permission to file its after-acquired claims.

DEFENDANT EXPEDIA'S MOTION TO
ALLOW FILING OF COUNTERCLAIMS -1-
NO. CV 05-1510RSM

DORSEY & WHITNEY LLP
U.S. BANK BUILDING CENTRE
1420 FIFTH AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101
PHONE: (206) 903-8800
FAX: (206) 903-8820

II. STATEMENT OF FACTS

Expedia filed its Amended Answer on August 23, 2005, prior to Defendants' removal of this action from King County Superior Court on September 2, 2005.¹ On October 6 and 7, 2005, counsel for both Plaintiff and Defendants participated in Rule 26(f) telephone conferences to discuss the parties' Joint Status Report and Discovery Plan. Baldwin Dec. ¶ 3. During these conversations, defense counsel learned that Plaintiff possessed the following:

1. Tens of thousands of Expedia documents, including documents containing trade secrets, proprietary, and other confidential information;
 2. An Expedia-issued laptop; and
 3. An Expedia-issued e-mail account.

Baldwin Dec. ¶ 3. Before these October telephone conferences, Expedia understood that Plaintiff had already relinquished her Expedia-issued computer, e-mail account, and all confidential documents. *Id.*, ¶ 4. While Expedia knew that Plaintiff intended to produce several thousand documents, including e-mails, in response to Defendants' discovery requests, Expedia did not know that such documents had been unlawfully taken from Expedia, or that they included proprietary information, trade secrets, and other highly confidential information belonging to the Company. *Id.*

Plaintiff's possession of these documents and other Expedia property violates the confidentiality provisions of her Employment Agreement, which in pertinent part survives termination of her employment. *See* Baldwin Dec., Exhibit pp. 12-24. After defense counsel's conference with Plaintiff's counsel on October 7, Expedia promptly notified Plaintiff that she was in breach of her Employment Agreement. *Id.*, Exhibit pp. 25-29. Relying on this newly-

¹ The Answers, Defenses and Affirmative Defenses of Defendant Expedia, Inc. to Plaintiff's Amended Complaint may be found at Docket No. 50 of the State Court Record, which was filed in its entirety with this Court at Docket No. 7.

1 acquired information, Expedia seeks to file Counterclaims alleging misappropriation of trade
 2 secrets, conversion, and breach of duty of loyalty.² *Id.*, Exhibit pp. 1-6.

3 III. AUTHORITY AND ARGUMENT

4 Federal Rule of Civil Procedure 13(e) provides that “[a] claim which either matured or
 5 was acquired by the pleader after serving a pleading may, with the permission of the court, be
 6 presented as a counterclaim by supplemental pleading.” Federal Rule 13(e) applies when facts
 7 giving rise to a claim arise after the filing of the complaint. Fed. R. Civ. P. 13(e); *AM Industries,*
 8 *et. al. v. Con-Vey/Keystone, Inc. et. al.*, 856 F. Supp. 1443, 1450 (D. Or. 1994).

9 Courts have considered Federal Rule 13 in conjunction with Federal Rule 15, which
 10 governs amendments to pleadings. *See Magnesystems, Inc. v. Nikken, Inc.*, 933 F. Supp. 944,
 11 947 (C.D. Cal. 1996). Rule 15(a) provides that “a party may amend the party’s pleading only by
 12 leave of court or by written consent of the adverse party; and *leave shall freely be given when*
 13 *justice so requires.*” (Emphasis added). The Federal Rules adopt a policy favoring amendments
 14 to pleadings, under which amendments are allowed “with extreme liberality.” *Chodos v. West*
 15 *Publ’g Co., Inc.*, 292 F.3d 992, 1003 (9th Cir. 2002); *Morongo Band of Mission Indians v. Rose*,
 16 893 F.2d 1074, 1079 (9th Cir. 1990). The “liberality in granting leave to amend is not dependent
 17 on whether the amendment will add causes of action or parties.” *DCD Programs Ltd. v.*
 18 *Leighton*, 883 F.2d 183, 186 (9th Cir. 1987).

19 A motion for leave to amend should be denied only when a party has unduly delayed in
 20 seeking leave to amend, is attempting to add allegations that are futile, or where allowing the
 21 amendment would result in substantial prejudice to the opposing party. *Morongo*, 893 F.2d at
 22 1079. The determination of whether one of these factors is present should be made with “all

25 ² Expedia is not currently asserting breach of contract, as Plaintiff is entitled to 30 days after
 notice of the breach in which to cure, and that period has not yet expired. (See Plaintiff’s
 Employment Agreement, attached as Exhibit pp. 12-24 to Baldwin Dec.) However, Expedia
 contends that Plaintiff’s breach is incurable, and therefore anticipates assertion of a breach of
 contract counterclaim in the immediate future, when the contractual notice interval expires.

1 inferences in favor of granting the motion" for leave to amend. *Griggs v. Pace American Group,*
2 *Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). As none of these factors are present in this case, this
3 Court should not deviate from the longstanding policy of permitting amendment with extreme
4 liberality. The Court should therefore grant Expedia permission to file its Counterclaims
5 pursuant to Federal Rules 13(e) and 15(a).

6 All of the Counterclaims Expedia moves to assert arise from the recent disclosure by
7 Ms. Henry's counsel that Ms. Henry had taken property—*thousands* of pages of documents and
8 e-mail messages, and an Expedia-issued laptop—belonging to Expedia, and from her refusal to
9 relinquish possession of all copies and documents derived from Expedia documents.
10 Consequently, Expedia's proposed Counterclaims are meritorious, timely, and should be
11 allowed.

12
13 DATED this 3rd day of November, 2005.

14 DORSEY & WHITNEY LLP

15
16 
17 Michael W. Droke, P.C. WSBA #25972
18 Kandis M. Baldwin WSBA #33069
19 Dorsey & Whitney LLP
1420 Fifth Avenue, Suite 3400
Seattle, Washington 98101
(206) 903-8800

20 Attorneys for Defendants IAC/InterActiveCorp
21 and Expedia, Inc.

CERTIFICATE OF SERVICE

On this 4th day of November 2005, I caused to be served a true copy of the foregoing DEFENDANT EXPEDIA'S MOTION TO ALLOW FILING OF COUNTERCLAIMS, and DECLARATION OF KANDIS M. BALDWIN IN SUPPORT OF DEFENDANT EXPEDIA'S MOTION FOR LEAVE TO FILE COUNTERCLAIMS, and Exhibits thereto, to:

Kathleen Barnard
SCHWERIN CAMPBELL BARNARD
18 West Mercer St., Suite 400
Seattle, WA 98119

- Via Messenger
 - Via ECF Notification
 - Via Electronic Mail
 - Via U.S. Mail
 - Via Overnight Mail

Dated: November 4, 2005

Cindy Acuff